UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4124

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board Order issued against the International Brotherhood of Electrical Workers, Local 98 ("Local 98" or "the Union"). The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151,

160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over the case under Section 10(e) of the Act (29 U.S.C. §160(e)), the unfair labor practices having occurred in Pennsylvania.

The Board's Decision and Order issued on July 30, 2004, and is reported at 342 NLRB No. 74. (A 3-26.)[1] That order is final under Section 10(e) of the Act. The Board filed its application for enforcement on September 18, 2006. The Board's application was timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Union violated Section 8(b)(1)(A) of the Act by threatening an employee, coercively photographing employees, and blocking employees from entering a jobsite.

2. Whether the Board is entitled to summary enforcement of its uncontested findings that the Union violated Section 8(b)(4)(i) and (ii)(B) of the Act by engaging in picketing and threatening to engage in picketing with an object of

[1] "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

forcing neutral employers to cease doing business with nonunion electrical contractors.

3. Whether the Board acted within its broad remedial discretion in issuing a broad cease-and-desist order and is entitled to enforcement of its Order in full where the Union failed to demonstrate any equitable basis for denying enforcement.

STATEMENT OF THE CASE

Acting on charges filed by several employers, including State Electric, Wohlsen Construction Company, and United Parcel Service, the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) of the Act. Following a hearing, an administrative law judge found merit to the General Counsel's allegations and issued a decision and recommended order (A 10-26), to which the Union excepted (A 973). The Board issued a decision affirming the judge's findings and adopting his recommended order. (A 3.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union Begins an Organizing Campaign at State Electric

Beginning in 1998 and continuing throughout the summer of 1999, the Union engaged in activities targeting four neutral employers – Adams-Bickel, the Cheltenham School District, Wohlsen Construction Company, and United Parcel Service. The Union's activities consisted of various efforts to dissuade those employers from using nonunion electrical contractors at four jobsites, respectively – Bellamine, Cheltenham, Philadelphia Protestant Home, and United Parcel Service.

In tandem with these activities, the Union began a campaign in August 1998 to organize employees at State Electric. (A 11; 391, 426.) The Union worked with IBEW Local 380 on the organizing campaign. The Union's principal organizer was Timothy Browne and Local 380's principal organizer was Kenneth MacDougall. (A 11; 391, 416, 418, 426.) Following successful efforts to obtain authorization cards from employees, on August 13, Local 380 filed a petition with the Board seeking to represent State Electric's employees. (A 11; 823.)

B. The Union Threatens Adams-Bickel with Picketing and Mass Demonstrations Because Adams-Bickel Hires State Electric for a Project

As part of the organizing drive, Browne and MacDougall visited various employer jobsites to ascertain if State Electric employees were on the job. (A 11; 393, 418, 425-26.) In early July 1998, Adams-Bickel began work as a general contractor on a project known as the Robert Bellamine Catholic Church jobsite. (A 12; 443.) State Electric was retained by Adams-Bickel to perform electrical work on the project. (A 12; 443.)

On July 29, Browne called the office of Gustavo Perea, Adams-Bickel's vice-president, and left a message asking why no union contractors were asked to bid on the project and stating that he was going to picket. (A 12; 444.) Browne also requested that Perea call him back. (A 12; 444.) Perea returned Browne's call the next day, speaking to him for 15 minutes, during which time Browne reiterated his complaint that no union contractors were on the job and stated his intention to engage in picketing, including "mass demonstrations," if Perea went forward without a union electrical contractor. (A 12; 444.) Browne informed Perea that he could not "allow the project to go forward without a union contractor doing the work." (A 12; 444.) Perea agreed to furnish Browne with a list of contractors who

submitted bids for the job and the parties agreed to discuss matters again in the near future. (A 12; 445.)

Browne called Perea on or about August 31 to "resolve the issues" at the Bellamine project. (A 12; 445.) When Perea replied that he was already under contract with State Electric, Browne responded, "If that's the way it's going to be, then the line has been drawn . . . let the games begin." (A 12; 446.) Browne further stated that he would create "a media event" by picketing and passing out leaflets at the Church "so that the Church and the members . . . would know that [Adams-Bickel] was using an inferior contractor, or a contractor that did not pay their people well, or treat their people well." (A 12; 447.) Browne indicated that he would give Perea prior notice of any action he intended to take. (A 12; 446.)

C. The Union Threatens and Coerces the Cheltenham School Board; the Union Threatens and Coerces State Electric Employees

The Cheltenham school board announced, at a public meeting on June 1, 1999, a decision to award electrical work on a high school renovation project to State Electric. (A 13; 453-54, 836.) Browne was present at the meeting and expressed opposition to State Electric's being awarded the work on the grounds that it was not properly staffed, had several liens against it, and used improper hiring practices. (A 13; 454.) Browne claimed that only a union electrical contractor could do the job properly. (A 13; 454.) The school board voted to

postpone awarding the contract until it could investigate Browne's allegations. (A 13; 455.)

Shortly after the June 1 meeting, Browne visited Cheltenham School District Director of Support Services Stephen Saile and dropped off a report which Browne claimed supported his assertions about State Electric's being unqualified to do the high school's electrical work. (A 13; 455.) A few days later, when Browne contacted him, Saile indicated that nothing in the report had caused Saile to change his recommendation that the school board hire State Electric. (A 13; 456.) Browne expressed disbelief at Saile's continued recommendation and told him to expect the same "kind of performance" that Browne and the Union were putting on at another local construction site where nonunion contractors were working. (A 13; 457.) Saile understood this to mean that Browne intended to have a union presence at the jobsite. (A 13; 457.)

On June 8, at a second public meeting of the Cheltenham school board, Browne renewed his statements about problems the school board could expect on the jobsite and specifically mentioned that he could throw up a picket line for 30 days and no one would be able to enter the jobsite, resulting in delays. (A 13; 398, 439, 462.) Browne described how he had successfully caused delays at another project run by a different general contractor. (A 13; 440.) When asked by the

school board president how such delays could be avoided, Browne replied, "Well, I don't know. Some days I wake up happy and some days I don't wake up so happy." (A 13; 440.) Browne did not offer a response to a further question as to what it would take to avoid a picket line. (A 13; 440.) A two-gate system was set up at the jobsite so that union and nonunion contractors at the site could enter and leave through their own gates without incident. (A 14; 464.) Local 98 did not picket the jobsite. (A 14; 481.)

After State Electric received the contract and began work at the Cheltenham jobsite, Browne visited on several occasions in late August 1999. (A 14; 464, 471, 498.) Browne walked through the jobsite, stating he was looking for a Local 98 employee, carrying a camera and taking pictures of work being done. (A 14; 465, 513, 527.) After finding the Local 98 employee and speaking with the construction manager, Browne placed a call to the local police and told them he was being threatened on the jobsite. (A 14; 465-67.) When the police came, Browne continued to complain about being threatened, stated he was not feeling well, and that he was going to sit in his car and wait for his attorney. (A 14; 468.) After an hour and a half, Saile asked Browne to leave the jobsite and, when Browne refused, Saile called the police. (A 14; 469.) Browne then drove his car off the

jobsite and stationed it outside the nonunion gate reserved for State Electric, where he proceeded to sit for several more hours. (A 14; 469-70.)

The following day, and for the next 2 days thereafter, Browne again came to the jobsite and sat outside the nonunion reserved gate for several hours, with other union representatives, taking pictures of people entering and leaving the jobsite as well as videotaping occupants of some vehicles and people coming and going on foot. (A 14; 471, 499, 514, 519-20.)

Browne also drove his vehicle between a forklift and a dumpster to prevent Vincent Ponticello, a State Electric foreman and brother-in-law of State Electric's owner, from completing his job of using the forklift to dump waste into a trash dumpster. (A 14; 525-26.) When Ponticello asked Browne to move his vehicle, Browne told Ponticello, "I know who you are, I know where you live. We're going to get you some day." (A 14; 526.) Ponticello walked away and Browne left his car in the way of the forklift for another 15-30 minutes before driving away. (A 14; 526.)

On a separate occasion, Browne followed Ponticello's vehicle through the nonunion gate into the jobsite parking lot where Browne proceeded to circle Ponticello's vehicle twice while videotaping the occupants. (A 15; 491.) Ponticello and a coworker got out of Ponticello's vehicle and into the pickup truck

of another coworker, and left the parking lot. (A 15, 491.) Browne followed and continued to photograph and videotape them as they headed to another area of the jobsite. (A 15; 491.)

D. The Union Pickets Philadelphia Protestant Home; The Union Blocks Workers from Entering Philadelphia Protestant Home

Wohlsen Construction, a nonunion general contractor, was hired by Philadelphia Protestant Home ("PPH") to renovate PPH's Webb Pavilion facility. (A 17; 51.) Dayspring Electric, a nonunion contractor, was retained by Wohlsen to do electrical work on the project. (A 17; 157.) PPH has three entrances to its facilities – a construction entrance for use by construction employees (gate 1), a main entrance (gate 2), and a resident/employee entrance (gate 3) located some 50 yards from the construction entrance. (A 17; 52-53.)

On May 24, 1999, Local 98 began picketing at all three entrances. Approximately 20 pickets were present at 7:20 a.m. at both the construction entrance and the main entrance carrying signs identifying themselves as being with Local 98 and Local 19. (A 17; 52-53.) Additionally, six or seven pickets were carrying the same signs at the resident/employee entrance. (A 17; 52.) Wohlsen's construction superintendent on the project instructed his employees and contractors to go home that morning. (A 17; 54.)

A mechanic for Lower Bucks Heating and Cooling, Peter Paolella, arrived at the jobsite around 6:00 a.m. and observed no pickets. (A 17; 131-32.) By 7:30 a.m., when he left through the construction entrance to retrieve tools from his truck, 15 to 20 pickets were at the entrance. (A 17; 132.) Upon his attempted return to the jobsite, Paolella's entrance was blocked by pickets who gathered shoulder-to-shoulder to prevent him from going in. (A 17; 132.) One of the pickets yelled out, "F__k you! Do you want to start something?" (A 17; 132.) Paolella told the pickets that he was not looking for trouble and only wanted to get his helper and tools out of the jobsite. (A 17; 132.) Paolella was called a "f__king bum" and told that he was not getting through the line. (A 17; 132.) Paolella returned to his truck and waited until his helper came out at 9:00 a.m. (A 17; 133.)

Dayspring Electric employee Michael Rearick observed the pickets at the construction entrance and main entrance when he drove up that day with a coworker. (A 17; 157-58.) Rearick parked and walked toward the construction entrance. (A 17; 159.) Upon his approach, the pickets positioned themselves shoulder-to-shoulder blocking the entrance and did not move, even when Rearick and his coworker continued walking toward the entrance. (A 17; 159.) No words were exchanged between Rearick and the pickets. (A 17; 160, 164.) After waiting

for 15 minutes, Rearick called his boss who instructed him to return to the shop. (A 17; 159.)

Dayspring Electric's Estimator and Project Manager, James Ward, observed pickets at all three PPH entrances at approximately 8:00 a.m. on May 24. (A 17; 174-75.) Some pickets were carrying signs reading, "NOTICE, PHILADELPHIA PROTESTANT HOME IS UNFAIR TO ELECTRICIANS, LOCAL 98, IBEW." (A 17; 175.) Mike Hnatkowsky, President of Local 98, informed Ward that the pickets were not there for Dayspring Electric, but for PPH because the Union did not want PPH using nonunion labor on its construction projects. (A 17; 77, 179.) Hnatkowsky further stated that the pickets would be handing out pamphlets the next day and would continue to block the entrances for the next month. (A 17; 179.) While observing and photographing the pickets, Ward saw two trucks, belonging to Neighborhood Health Care and Superior Moving, attempting to enter PPH through the main entrance but being forced to turn away because the entrance was blocked by pickets. (A 18; 185-87, 586-93.)

Picketing by Local 98 continued the next day, May 25, with pickets located at the construction and resident/employee entrances. (A 18; 55.) At approximately 7:00 a.m., a Wohlsen truckdriver could not get through the construction entrance because it was blocked by pickets. (A 18; 56.) Around 7:15 a.m., Wohlsen

construction superintendent Michael Bierds had reserved gate signs posted at the three entrances, as follows:

GATE #1
This gate is reserved for the exclusive use of employees,
suppliers, and visitors of contractor(s)

The signs posted at gates 2 and 3 were identical and read as follows:

GATE #
This entrance may not be used by employees, suppliers,
and materialmen of the contractors or visitors. Employees,
suppliers and materialmen of the contractors must use Gate #1.

(A 18; 58-61, 572-74.)

After the signs were posted, Bierds attempted to give a letter to Hnatkowsky and the pickets who were gathered at the main entrance (gate 2) advising them of the establishment of the reserved gate system, and instructing that all picketing be restricted to gate 1. (A 18; 117, 584.) Hnatkowsky and the pickets refused to accept the letter, which Bierds then read aloud. (A 16; 117, 123.)

Even after the signs were posted, Dave Smith Plumbing employees were prevented by the pickets from entering at the construction entrance. (A 18; 63, 142.) One of the pickets informed the driver of the plumbing van, "You don't want to cross this line." (A 18; 142.) The driver then attempted to enter the jobsite through the resident/employee entrance but was again unsuccessful. (A 18; 148.)

Two hours later, between 9:15 and 9:30 a.m., Bierds modified the gate 1 sign by inserting the phrase "performing work on Webb Pavilion" at the end, so that the sign now read, "This gate is reserved for the exclusive use of employees, suppliers, and visitors of contractors performing work on Webb Pavilion." (A 18; 59, 572.) Bierds similarly modified the signs at gates 2 and 3 by adding the words, "for Webb Pavilion" at the end. (A 18; 59-61, 574.)

During this same time frame, around 9:00-9:15 a.m., two trucks driven by employees of Sharp's Landscaping were blocked at the main entrance when four pickets positioned themselves in front of the trucks, with one of them telling the driver that the trucks were not allowed in and should go home. (A 18; 66, 73, 152.) The pickets then took turns standing in front of the trucks to prevent their entry until yielding a few minutes later. (A 18; 73, 152-53.) The pickets remained at the entrances until at least 11:00 a.m. that day. (A 18; 75.)

E. The Union Threatens United Parcel Service; the Union Pickets United Parcel Service; the Union Blocks Workers from Entering United Parcel Service facility

United Parcel Service ("UPS") is an international parcel delivery service and maintains a facility on Oregon Avenue in Philadelphia. (A 21; 196.) The Oregon Avenue facility has four entrances. (A 21; 202-03, 594.) Entrance 1 is for employee use, entrance 2 is for use by UPS' tractor-trailers, and entrance 3 is for

use by employees working in that part of the facility, by brown UPS delivery vehicles, and tractor-trailers. (A 21; 202-03.) Entrance 4 is a vendor entrance for use by contractors and subcontractors retained by UPS. (A 21; 203.) In addition to the four gates, the Oregon Avenue facility has four large overhead doors located just east of Gate 1. (A 21; 266.)

UPS contracted with Network Dynamic Cabling ("NDC") to perform some cabling work at its Oregon Avenue and Philadelphia airport facilities and with G.M. Shuhart Electric to perform electrical work. (A 21; 200.) Both were nonunion companies. (A 20; 200.) On May 11, 1999, Bill Corazo of Local 98 contacted Frank Maxwell, Labor Relations Manager of UPS' Metro Philadelphia District, and requested that Maxwell meet with him outside the Oregon Avenue facility. (A 21; 193, 195-96.) Subsequently, Maxwell, Corazo, and Ray Della Vella, who was also there representing Local 98, met on the sidewalk in front of the facility. (A 21; 196.) Corazo identified NDC as a contractor that the Union was having problems with, stating in particular that unfair labor practice charges had been filed against NDC and that NDC was not a good contractor for UPS. (A 21; 196.) Maxwell agreed to look into Corazo's allegations. (A 21; 197.)

Three weeks later, on June 2, Corazo and Della Vella went to the Oregon Avenue facility and again spoke to Maxwell outside, this time with UPS Labor

Manager Mark Aaron also present. (A 21; 197.) Corazo repeated much of what he had said earlier about NDC and added that NDC was in violation of certain city codes, did not have proper permits and licenses, had not paid its business privilege or city wage taxes, and was a substandard employer. (A 21; 197-98.) Corazo further indicated that he had union contractors who would do the work for the same price as NDC. (A 21; 222.) Maxwell expressed a willingness to receive a list of union contractors from Corazo to include them in the bidding process for any future work that might be available. (A 21; 222.) Maxwell agreed to look into whether or not NDC was complying with city requirements, but also made clear that UPS was bound by its contract with NDC and the contractor would remain on the property until the work was completed. (A 21; 198-99.) Della Vella indicated that he and Corazo had "tried to be nice," but this was not all they could do, stating "we can come back, not just the two of us, but en masse, but that's not a threat." (A 21; 198.) Della Vella complained about UPS' having another nonunion contractor, Shuhart Electric, doing work at the facility. (A 21; 200.) Maxwell asked Corazo to give him advance notice of any action the Union might take at the facility. (A 21; 199.)

The following day, June 3, Maxwell had signs posted at entrances 1, 3, and 4. The signs posted at entrances 1 and 3 read:

This entrance is reserved for the exclusive use of United Parcel Service Inc., its employees, customers, vendors, delivery agents, and subcontractors.
Employees of Network Dynamic Cabling and G.M. Shuhart Electric may not use this entrance, but must use the Northern Weccacoe Street entrance.

(A 22; 205, 595.) The entrance 4 sign read:

Northern Weccacoe St. Entrance
This entrance is reserved for the exclusive use of Network Dynamic Cabling and G.M. Shuhart Electric, and their employees, vendors, or subcontractors.

(A 22; 206, 597.) Entrance 2 already had a sign posted dating from a 1997 labor dispute and strike, which read:

"THIS ENTRANCE IS RESERVED FOR THE EXCLUSIVE USE OF UNITED PARCEL SERVICE VEHICLES ONLY"

(A 22; 206, 596.)

The Union picketed at the Oregon Avenue facility on June 24. (A 22; 263.) At approximately 6:40 a.m., 50-60 pickets were standing around entrances 2, 3, and 4 carrying signs identifying them as being with the Union. (A 22; 263.) Five to seven pickets wearing union signs were also observed at around 6:50 a.m. standing in front of the four overhead doors. (A 21; 327-29.) UPS Area Security manager Gene McClone, after being directed by the pickets to Della Vella as the person in charge, asked Della Vella why they were there. (A 22; 267-68.) Della Vella responded that they were protesting because one of UPS' contractors was

nonunion. (A 22; 267, 290.) McClone advised Della Vella that UPS' vendors were to use entrance 4 and, thus, any picketing should be restricted to that entrance. (A 22; 268.) Della Vella was not informed that NDC was not onsite at the facility that morning. (A 21; 290.) When McClone asked Della Vella if any UPS vehicles would be let in or out of the facility, Della Vella responded, "No way, no fucking thing's coming in and out of this building." (A 22; 268.)

Consistent with Della Vella's statement, vehicles were in fact prevented by the Union from entering or leaving the facility. (A 22; 268-71.) Four tractor-trailers were unable to enter because pickets were blocking entrance 3, a delivery vehicle from Corporate Express carrying general office supplies was likewise prevented from using entrance 3 to get into the facility, and a tractor-trailer carrying next day air products was prevented from exiting the facility. (A 22; 268-70.) A tractor-trailer carrying high-priority, time-sensitive packages was denied entry by the pickets, leading McClone to ask Della Vella to let the shipment through. Della Vella repeated that "nothing was going in or out of the building." (A 22; 271.) McClone then instructed the driver, UPS supervisor Dennis Craig, to attempt to enter the facility through an old, unused gate. (A 22; 272.) Craig had already made several unsuccessful attempts to enter through entrance 3 but was

blocked by pickets. (A 22; 271, 300). Craig eventually crashed through the old, unused gate, which had been welded shut. (A 22; 301.)

Della Vella and Corazo also spoke to UPS Metro Philadelphia Operations Manager Bruce Trotter later that morning. (A 22; 340.) Corazo told Trotter that the Union had gotten no satisfaction from talking with Maxwell about NDC and that the pickets were not going to move. (A 22; 340.) Along with telling Corazo that he had time-sensitive packages that needed to be delivered, Trotter informed Corazo that NDC was not at the facility. (A 22; 340.) After Corazo returned from making a phone call, Trotter pulled him aside and asked what it was "going to take . . . to get the pickets from in front of my building and get these packages out for delivery . . . ." (A 22; 341.) Corazo responded that UPS would need to meet with the Union and "talk about making sure that [UPS didn't] use NDC, and that [UPS] g[a]ve [the Union] a chance at doing work on Oregon Ave." (A 22; 341.) When Trotter agreed to meet with the Union and keep NDC out of the facility in the meantime, the pickets dispersed after 3 to 4 minutes. (A 22; 342.) Operations at the facility were disrupted at least 2 hours because of the pickets. (A 22; 308, 342.)

Around 12:30 p.m. the same day, Trotter received a phone call from Corazo complaining that he had seen an NDC truck going into UPS' Philadelphia airport

facility. (A 22; 342.) Trotter replied that he had no knowledge of NDC's being at that facility but would have it removed consistent with his earlier promise to Corazo that NDC would be kept out of UPS facilities until the parties met. (A 22-23; 343.)

Union and UPS officials met the next day, June 25. (A 23; 210, 344.) Trotter began the meeting by giving the Union an opportunity to express its concerns. (A 23; 210, 344.) John Daugherty, who identified himself as the head of the Union, stated that he would use his political and other connections, which he described, to secure work for union members at the Oregon Avenue facility. (A 23; 344.) Daugherty and Corazo made statements about NDC being a substandard contractor. (A 23; 210, 345.) Daugherty also brought up the airport work and indicated he had a union company that could do the work. (A 23; 345.) Trotter and Maxwell both informed the union representatives that their picketing had amounted to illegal secondary picketing and should not have taken place. (A 23; 211.) Daugherty's response was that he was exercising his First Amendment rights. (A 23; 211.)

When Daugherty mentioned another UPS job to be done at the airport and his interest in getting that work for his members, Maxwell responded that shutting down a UPS facility for an hour and a half was a funny way of showing a

willingness to work with UPS. (A 23; 213.) Daugherty replied, "if [you] want to fight the fight, [I'll] fight it" and "if it's a big fight, it just means a big win for [me]." (A 23; 214.) After boasting of fighting bigger companies before, including AT&T and Home Depot, Daugherty stated that he "would do whatever [the Union] had to do to get [UPS'] work." (A 23; 214.) Maxwell agreed to look into NDC's licensing and payment of its business privilege taxes. (A 23; 214.)

Soon after the meeting, Maxwell phoned Corazo to obtain assurance that the Union would not engage in mass picketing at the Oregon Avenue facility again. (A 23; 215.) Corazo replied that "as long as [UPS] kept NDC . . . off property . . . there would be no Union activity." (A 23; 215.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber, Member Liebman dissenting in part[2]), in agreement with the administrative law judge, found that the Union violated Section 8(b)(1)(A) when Browne blocked Ponticello from performing his work, threatened Ponticello with physical harm, and coercively photographed him and other employees at the Cheltenham jobsite. (A 1.) The Board further found that the Union violated

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[2] Member Liebman did not dissent from any finding of violations by Local 98. Her dissent pertained only to violations found to have been committed by Local 380, which are not at issue before the Court.

Section 8(b)(4)(ii)(B) when Browne threatened both Adams-Bickel and the Cheltenham School District for doing business with State Electric. (A 1, 12, 15.)

The Board found that the Union violated Section 8(b)(1)(A) at the PPH jobsite by blocking ingress and egress at the facility and by threatening Paolella with physical harm when he attempted to enter the jobsite. (A 20-21.) Additionally, the Union violated Section 8(b)(4)(i)(B) by engaging in secondary picketing at the reserved gates at PPH with an object of forcing PPH and/or Wohlsen Construction to cease doing business with Dayspring Electric. (A 20.)

The Board found that the Union violated Section 8(b)(4)(i)(B) by engaging in secondary picketing at the reserved gates at UPS with an object of forcing UPS to cease doing business with NDC. (A 24.) Furthermore, the Board found that the Union violated Section 8(b)(4)(ii)(B) by threatening to engage in secondary picketing at UPS. (A 23-24.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court and Board counsel is not aware of any related case pending before this or any other court.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

When reviewing the Board's determination in a particular case, this Court must "accept the Board's factual determinations and reasonable inferences derived

from [those] determinations if they are supported by substantial evidence." *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002). *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 304 U.S. 474, 487-88 (1951). This Court therefore cannot "substitute [its] view of the record even if [it] would have reached different conclusions on *de novo* review." *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994) (citing *Universal Camera*, 340 U.S. at 488).

"The Board's credibility determinations in particular merit great deference." *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir. 1989). This is because the administrative law judge "sees the witnesses and hears them testify," while the Court looks "only at cold records." *ABC Trans-National Transport, Inc. v. NLRB*, 642 F.2d 675, 684 (3d Cir. 1981) (citation omitted). Accordingly, the Board's "findings should be given great deference, particularly when they are based on demeanor testimony. . . ." *Id.* at 686.

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to issue an order requiring a labor law violator to cease and desist from the violations found and "to take such affirmative action . . . as will effectuate the policies" of the Act. This statutory command "vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject

only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). *Accord St. John's Gen. Hosp. of Allegheny v. NLRB,* 825 F.2d 740, 746 (3d Cir. 1987). The standard of review for Board remedial orders is abuse of discretion; thus, a Board order should not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-16 (1964) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

SUMMARY OF ARGUMENT

With seeming complete disregard for the Act and its prohibitions on secondary union activity, the Union engaged in repeated unlawful conduct aimed at coercing several neutral employers to cease doing business with nonunion electrical contractors. The Union threatened employees and employers alike in its quest to oust the contractors it viewed as undesirable. Employee Vincent Ponticello was threatened that "we'll get you someday." Ponticello and other employees at Cheltenham were subjected to coercive photographing of their comings and goings. Adams-Bickel, the Cheltenham School District, and UPS were threatened with picketing that would disrupt their business activities.

As promised, the Union placed pickets at UPS that blocked ingress and egress while fully disregarding the facility's reserved gate system. This picketing was a repeat of the unlawful secondary picketing the Union had engaged in at PPH a month earlier. The picketing at PPH blocked employees, regardless of their affiliation with the project's general contractor or nonunion electrical subcontractor, from entering the jobsite. While the pickets were in place, an employee attempting to enter was also threatened.

Finding that the Union had demonstrated a proclivity to violate the Act with its widespread unlawful conduct, most of which the Union does not dispute here, the Board ordered a broad cease-and-desist remedy. The Union has failed to show any reason why this remedy was not warranted, when the Union's conduct is considered, as it must be, in its entirety. Despite its proclivity to violate the Act, the Union now would have the Court look the other way and refuse to enforce the Board's Order for various asserted equitable reasons that are simply erroneous – the Board is not attempting to expand a prior judgment of this Court; the Board's application for enforcement was timely filed and there has been no change in the relative positions of the parties since the Board's Order issued; compliance is not a defense to enforcement; and the Board is not circumventing any administrative process by seeking enforcement of its Order in the manner prescribed the Act.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY THREATENING AN EMPLOYEE, COERCIVELY PHOTOGRAPHING EMPLOYEES, AND BLOCKING EMPLOYEES FROM ENTERING A JOBSITE

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) provides in pertinent part that: "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ."[3] The Board reasonably found, based on substantial evidence, that the Union repeatedly violated Section 8(b)(1)(A) through its conduct at the Cheltenham and PPH jobsites by interfering with employees' rights to refrain from labor activity and to engage in work activity.

The Board found (A 3) that the Union, through Browne, violated Ponticello's Section 7 right to refrain from assisting the Union and to perform work by blocking his access to the dumpster and threatening him. *See NLRB v. Sheet Metal Workers' Int'l Assoc., Local Union No. 19*, 154 F.3d 137, 140, 143

[3] Section 7 of the Act (29 U.S.C. § 157) gives employees the following rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

n.10 (3d Cir. 1998) (finding violation of 8(b)(1)(A) where a union blocked access to a jobsite and implicitly threatened employees with violence); *Gen. Maint. Serv. Co.*, 329 NLRB 638, 685 (1999) ("nonviolent conduct, including efforts to prevent employees from reporting to work by impeding access to an employer's facility," violates Section 8(b)(1)(A)).

Contrary to the Union's statement (Br 34), Browne did threaten someone, namely Ponticello, at the Cheltenham jobsite. Browne told Ponticello "we're going to get you someday" following Browne's remarks to Ponticello that "I know who you are. I know where you live." (A 14; 526.) The Union (Br 35) puts much stock in Ponticello's personal interpretation of the threat to mean that State Electric would be unionized someday. However, as the Board found (A 3), "the fact that Ponticello did not testify that he subjectively felt threatened by Browne's statement is not dispositive of the 8(b)(1)(A) allegation." The Board "applies an objective test" (A 3) which considers whether a statement has a reasonable tendency to coerce or intimidate, rather than whether any employee actually was coerced or intimidated. *United Bhd. of Carpenters & Joiners (Society Hill Towers Owners' Ass'n)*, 335 NLRB 814, 814-15 (2001); *see also NLRB v. United Mine Workers of America*, 429 F.2d 141, 146 (3d Cir. 1970); *Local 542, Int'l Union of Operating Eng'rs v. NLRB*, 328 F.2d 850, 852-53 (3d Cir. 1964).

The context of Browne's statement supports the Board's finding that it had a reasonable tendency to be coercive. Browne was using his car to block Ponticello from doing his job and made the threatening remark when Ponticello asked him to move the car. (A 14; 526.) Thus, the Board reasonably found that telling someone, while denying them the ability to do their work, "I know who you are" and "where you live" and "we're going to get you someday" was not a benign statement about unionization but rather a veiled threat of physical harm. *See Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 160-61 (1997) ("we know who you are and we know where you live" found to be an unlawful threat made by a picket to an employee).

The Board further found (A 3) that the Union violated Section 8(b)(1)(A) when Browne coercively photographed Ponticello and other employees entering and exiting the Cheltenham jobsite for 3 days. Browne was not merely taking pictures of Ponticello – as shown above, he was also issuing threats. *See Mike Yurosek & Sons*, 292 NLRB 1074, 1074 (1989) (photographing of employees by union constituted objectionable election conduct where threats were contemporaneously issued).

Additionally, while in his car, Browne followed a vehicle transporting Ponticello and a couple of coworkers around the jobsite, circled the vehicle, and

videotaped the occupants.[4] (A 4.) Browne offered no explanation for taking the photographs and his conduct could reasonably have led employees to believe that the photos would be used by the Union in the future to harass, intimidate, or retaliate against them. *See NLRB v. Serv. Employees Int'l Union, Local 254*, 535 F.2d 1335, 1337 (1st Cir. 1976) (photographing employees and writing down license plate numbers violated 8(b)(1)(A) where purpose was to intimidate employees); *Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328, 1336 (1993) (giving appearance of photographing or videotaping license plates and occupants of vehicles crossing picket line violated 8(b)(1)(A)).

Employees have a Section 7 right to cross a picket line and report for work. A union's interference with that right violates Section 8(b)(1)(A). *Sheet Metal Workers'*, 154 F.3d at 140, 143 n.10; *Local 542, Operating Eng'rs*, 328 F.2d at 852-53. "It is well-settled that picketing which interferes with or blocks the ingress and egress of employees and others at a place of employment, or which, in

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[4] The Union's attempt (Br 36) to assert that Browne did not engage in such conduct because there are no photographs of him doing so, and Ponticello was the only witness to testify about the incident, must fail. Clearly, the General Counsel can meet his burden of showing an event occurred by a preponderance of the evidence without photographic evidence. Moreover, Browne, in his testimony, did not deny the incident and Ponticello's account was unrefuted and expressly credited. (A 15.) *See Hajoca Corp*., 872 F.2d at 1177 ("Board's credibility determinations . . . merit great deference").

effect, forces employees to 'run a gauntlet,' is inherently coercive and in contravention of the Act." *United Mine Workers*, 429 F.2d at 146.

The Union prevented employees from passing through the line of pickets and entering the PPH jobsite. Lower Bucks Heating and Cooling employee Paolella was prevented from returning to the jobsite after he had simply run out to his truck for some tools. The pickets did not simply discourage Paolella from entering; the pickets physically blocked the gate with their bodies. Hostility was expressed to Paolella when a picket yelled at him "F__k you! Do you want to start something?" (A 17; 132.) This threat was itself coercive and violative of Section 8(b)(1)(A). *United Mine Workers*, 429 F.2d at 146 (statement having reasonable tendency to coerce or intimidate employees violates Section 8(b)(1)(A)). Dayspring Electric employee Rearick and a coworker could not report to work because their entrance was blocked by union pickets. The pickets closed ranks and stood shoulder-to-shoulder when Rearick approached the gate. This action clearly conveyed a message to Rearick that he was not to enter the jobsite. The testimony of Paolella and Rearick about their encounters with the pickets, who kept them from reporting to work, was unrefuted and thus properly credited by the judge. *See Hajoca Corp.*, 872 F.2d at 1177.

The next day, the Union again prevented employees from entering the PPH jobsite. Dave Smith plumbing employee Blair was not permitted to enter and was told "you don't want to cross this line." (A 18; 142.) It is undisputed (Br 32) that several Sharp's Landscaping employees, including Goldsmith, were initially blocked from entering and were only let through after repeated attempts and a delay of several minutes.

The Union's arguments in defense of its blocking entry to the jobsite, including that employees did not ask the pickets for permission to enter and that any blockage was de minimis, are without merit. Contrary to the Union's repeated assertions (Br 30-32), it is not necessary for the General Counsel to show that employees asked the pickets for permission to enter the facility and were then denied access. The Board rejected the Union's claim that the employees must make such a request as "so lacking in merit as to warrant little, if any, discussion." (A 20.) Simply put, employees are not required to ask permission to exercise their statutory rights. The stance of the pickets, standing shoulder-to-shoulder in front of the vehicles and physically obstructing entry, in any event made clear that the pickets' intent was to block access to the jobsite. Furthermore, there is no basis in fact or law for the Union's argument (Br 32) that the Board should have presumed

that construction workers are more "more thick-skinned" than other employees when determining whether the Union's conduct trampled their Section 7 rights.

The Union argues (Br 33) that any blocking of the landscapers was de minimis. The Board rightfully rejected this argument. *See Shopmen's Local Union No. 43 (Stokvis Multi-Ton Corp.)*, 243 NLRB 340, 346 (1979) (pickets refusing to allow truck to exit facility for several minutes acted unlawfully because "blocking an entrance or an exit even for a short period of time constitutes restraint and coercion within the meaning of the Act"). Finally, even if the protesters had not effectively prevented the employees from passing through an entrance, the act of blocking the entry violated the Act. *United Mine Workers*, 429 F.2d at 146 ("It need not be shown that the massing of pickets in fact achieved its intended result in order to establish a violation of Section 8(b)(1)(A)."); *see also Meat Packers (Hormel & Co.)*, 287 NLRB 720, 721 (1987).

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE UNION VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT BY ENGAGING IN PICKETING AND THREATENING TO ENGAGE IN PICKETING WITH AN OBJECT OF FORCING NEUTRAL EMPLOYERS TO CEASE DOING BUSINESS WITH NONUNION ELECTRICAL CONTRACTORS

Before this Court, the Union does not contest (Br 41-43) the Board's findings that it violated Section 8(b)(4)(i) and (ii)(B) of the Act (29 U.S.C. §

158(b)(4)(i) and (ii)(B)) by threatening neutral employers Adams-Bickel, the Cheltenham School District, and UPS with secondary picketing, as well as actually engaging in secondary picketing at PPH and UPS. Under well-settled law, the Union's failure to contest these findings constitutes a waiver of any defense and warrants summary enforcement of the Board's Order with respect to the violations of Section 8(b)(4). *NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996); *NLRB v. Browning-Ferris Indust., Inc.*, 691 F.2d 1117, 1125 (3d Cir. 1982) (where brief "failed to challenge the Board's order on the merits, that issue is considered as having been abandoned and will not be considered by the Court on . . . review") (quoting *NLRB v. Tennessee Packers, Inc*., 344 F.2d 948, 949 (6th Cir. 1965)); *see also Reform Party v. Allegheny County Dep't of Elections*, 174 F.3d 305, 316 n.11 (3d Cir. 1999) ("[a]n issue is waived unless a party raises it in its opening brief") (citation omitted).

The uncontested Section 8(b)(4) violations do not disappear by not being argued in the Union's brief. Rather, "[t]hey remain, lending their aroma to the context in which the [remaining] issues are considered." *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982). As shown below, the Board's uncontested findings, based on wholly unrebutted testimony and photographic evidence demonstrating that the Union repeatedly engaged in

unlawful actions aimed at coercing neutral employers to not do business with nonunion contractors, support the Board's broad order remedy.

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ISSUING A BROAD CEASE-AND-DESIST ORDER AND IS ENTITLED TO ENFORCEMENT OF ITS ORDER IN FULL WHERE THE UNION FAILED TO DEMONSTRATE ANY EQUITABLE BASIS FOR DENYING ENFORCEMENT

A. The Board Did Not Abuse Its Discretion In Issuing A Broad Remedial Order In Light Of The Union's Proclivity To Violate The Act And Its General Disregard For Employees' And Neutral Employers' Fundamental Statutory Rights

The Board's statutory mandate expressly allows the Board to issue a remedial "order requiring such person [as committed the unfair labor practice] to cease and desist from the unfair labor practice" and to take other affirmative action to effectuate the policies of the Act. 29 U.S.C. § 160(c). Where a union has demonstrated a proclivity to violate the Act, the Board acts within its discretion in issuing a "broad" remedial order – that is, one not limited to the parties or the particular dispute involved in the case before it. *Hickmott Foods*, 242 NLRB 1357, 1357 (1979) (holding that broad orders are warranted where a party has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights"). Such orders constitute an appropriate means of protecting "other employees [and employers] . . . exposed to the same type of pressure through other comparable channels." *Electrical Workers*

Local 501 v. NLRB, 341 U.S. 694, 705-06 (1951). Courts have upheld such broad remedial orders. *See, e.g. Federated Logistics & Operations v. NLRB*, 400 F.3d 920 (D.C. Cir. 2005); *NLRB v. G & T Terminal Packing Co., Inc.*, 246 F.3d 103 (2d Cir 2001); *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 624 (2d Cir. 1994); *NLRB v. So-Lo Foods, Inc*., 985 F.2d 123, 126 n.4 (4th Cir. 1993); *Coil-A.C.C., Inc. v. NLRB*, 712 F.2d 1074, 1076 (6th Cir. 1983).

Here, the Board found that the Union had committed three different types of unfair labor practices multiple times and had engaged in this unlawful activity against four different employers as well as individual employees. The Board observed that the Union had engaged in similar unlawful Section 8(b)(4)(B) conduct in *Int'l Bhd. of Elec. Workers, Local 98 (The Telephone Man)*, 327 NLRB 593 (1999), and noted that the Union "has not changed its ways." (A 25.) The Board thus reasonably concluded that "[the Union] has, by its conduct herein, demonstrated a deliberate and near contemptuous disregard for the Board's processes and remedial orders, and has again shown its proclivity to violate the Act as well as a general disregard for the fundamental rights of employees and neutral employers." (A 25.) The Board accordingly ordered the Union to cease and desist, not only from the unfair labor practices found, but also from "[i]n any other

manner" interfering with employees' statutory rights and from coercing "any other employer." (A 25.)

The Board found a broad order necessary here based on several factors. First, the violations were numerous and varied, including three different types of unfair labor practices – interference with employees' statutory rights, secondary picketing, and threats to engage in secondary picketing. *See Sheet Metal Workers'*, 154 F.3d at 140.

Second, a broad order was imposed because the Union engaged in unlawful conduct involving several employers all within the span of the summer of 1999. *Sheet Metal Workers'*, 154 F.3d at 140, 143 n.10 (enforcing broad order where union engaged in unlawful conduct at three separate jobsites involving three different employers); *NLRB v. Highway Truckdrivers & Helpers, Local No. 107*, 300 F.2d 317, 322 (3d Cir. 1962) (enforcing broad order where "a strong factual basis in the record" showed union "interfered with activity" of multiple employers). As in *Highway Truckdrivers & Helpers*, the record here shows "the union's obvious proclivity to engage in unlawful secondary activity when and where such conduct suits its purpose . . . ." 300 F.3d at 322.

Furthermore, the Union's conduct affected a large group of employees. At the Cheltenham site, all employees coming or going over the course of several

days were subject to being photographed in a coercive manner. At the PPH site, employees of several different employers, most wholly unconnected with the Union's dispute, were prevented from going to work.

Finally, it is undisputed that in several instances, unfair labor practices were planned, overseen, and defended by the same union officials. Mike Hnatkowsky, the President of Local 98, was the line leader for the pickets at PPH in May 1999. (A 17; A 77.) Hnatkowsky was also present at the meeting with UPS officials where the Union defended its unlawful picketing. (A 23; A 210.) Ray Della Vella both threatened UPS with secondary picketing in May 1999 and then carried out that threat by taking charge of the pickets a month later. (A 21-22; A 198, 268.) Timothy Browne unlawfully threatened both Adams-Bickel and the Cheltenham school district with secondary picketing, as well as threatening Ponticello and coercively photographing employees at the Cheltenham jobsite. (A 12-14; A 146, 398, 439, 462, 471, 519-20, 526.) The repeated involvement of Hnatkowsky, Della Vella, and Browne in unlawful acts demonstrates both the Union's overall disregard of its responsibilities under the Act and the likelihood of future violations.

The Union's multiple and varied violations against different employers and employees suggests a danger that, unless broadly enjoined, it will find other ways

to interfere with employee rights in future disputes with nonunion employers or future organizing campaigns. *See Sheet Metal Workers'*, 154 F.3d at 139, 143 n.10 (enforcing broad order where union threatened employees seeking access to jobsites and picketed at jobsite gates reserved for use by neutral employers); *Highway Truckdrivers & Helpers*, 300 F.2d at 322 (enforcing broad order where union threatened employees of secondary employers, obstructed an entrance and exit from a freight terminal, and induced and encouraged employees of neutral employers to refuse to do business with a secondary employer). The Union's conduct is exactly the type of "widespread" conduct that broad orders are designed to remedy. *Hickmott*, 242 NLRB at 1357.

B. There Is No Merit To The Union's Challenge That The Board's Broad Remedial Order Is Unnecessary In Light Of Another Broad Remedial Order Issued Against The Union In An Earlier Proceeding

In its effort to avoid enforcement of the Board's broad remedial Order, the Union argues (Br 38-43) that this Court should not enforce the Board's Order because this Court has already entered a default judgment enforcing a broad remedial order against the Union in another case[5] where it engaged in similar unlawful secondary picketing, and because the unlawful Section 8(b)(1)(A)

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[5] *Int'l Bhd. of Elec. Workers, Local 98 (The Telephone Man)*, 327 NLRB 593 (1999), *enforced*, *NLRB v. Int'l Bhd. of Elec. Workers, Local 98*, No. 99-3997 (September 29, 2000).

conduct, standing alone, does not warrant a broad order. As shown below, the Court is precluded from considering this argument because it was never made before the Board. In any event, the fact that this Court has entered a default judgment and subsequent consent orders against the Union enjoining violations of Section 8(b)(4) does not constitute a reason to deny enforcement of the instant broad order remedying additional like violations of the Act.

In the first instance, the Union did not argue to the Board that a broad order was not warranted in this case because of the prior judgment.[6] As such, the Union is foreclosed from making that argument here. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 666 (1982); *NLRB v. FES*, 301 F.3d 83, 88-89 (3d Cir. 2002).

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[6] The default judgment in *The Telephone Man* and the subsequent consent orders referenced in the Union's brief all issued while this case was pending before the Board on the Union's exceptions to the judge's decision. At no time during the pendency of this case before the Board did the Union seek to have the Board not adopt the judge's recommended instant broad order based on this Court's enforcement of the prior order. In fact, the Union has never presented any argument to the Board relying on *The Telephone Man* as a basis for modifying or withdrawing the broad order which the Board is now seeking to enforce.

In any event, the uncontested Section 8(b)(4) conduct involved in this case is not covered by the prior enforcement action in *The Telephone Man*. In that case, the Board found that the Union engaged in unlawful Section 8(b)(4) conduct between 1996 and 1997 toward 10 separate neutral employers in a 19-month period, involving picketing, threats to picket, and work stoppages at 6 locations in the Philadelphia area. The Board concluded that the Union's conduct demonstrated the Union's "proclivity for violating the Act and its general disregard for the fundamental rights of employees and neutral employers" and issued a broad remedial order enjoining further unlawful violations of Section 8(b)(4). *The Telephone Man*, 327 NLRB at 602. The uncontested Section 8(b)(4) conduct in this case is not covered by the judgment in *The Telephone Man* even though the unlawful conduct here occurred in 1999 because the broad order in the prior case was not enforced by this Court until late 2000.

In effect, the Union is asking the Court to ignore that its 1999 unlawful picketing here could not have been found in contempt of the 2000 judgment in *The Telephone Man*, and to absolve it of its ongoing proclivity to violate Section 8(b)(4)(B), simply because it subsequently entered into consent orders when it committed additional violations of the same section of the Act. Indeed, even when the *The Telephone Man* case was pending before this Court, the Union continued

to engage in unlawful conduct, and thus, the Board was fully justified in entering another broad remedial Order. The Union's position (Br 42) – that a repeat offender of Section 8(b)(4) should not be subject to repeat enforcement actions– is absurd.

Moreover, while the Union invites this Court to ignore its numerous violations of Section 8(b)(1)(A), some of that unlawful conduct – repeatedly blocking employee access to the jobsite – occurred in the course of the Union's unlawful secondary picketing. The Union's position, if adopted, would void the Board's broad remedial relief for the Union's pervasive violations of Section 8(b)(1)(A) including threatening Ponticello, coercively photographing Ponticello and other employees, and repeatedly blocking employee access to a jobsite.

Furthermore, there is simply no evidence to support the Union's claim (Br 23-24) that the Board is attempting to somehow expand the prior judgment and consent orders by seeking enforcement of its Order here. The Board is seeking enforcement of its Order as written – no more and no less. The Union can point to no way in which the *The Telephone Man* judgment and consent orders themselves will be altered by enforcement of the Board's Order in this case.

C. The Union's Other Arguments Lack Merit

The Union also asserts (Br 21-22) that the Board should be denied enforcement of its Order under the doctrine of laches because the application for enforcement was filed 2 years after the Board issued the Order. As the Union concedes (Br 26), however, enforcement is governed by Section 10(e) of the Act (29 U.S.C. § 160(e)), which places no time limit on the Board's application. *See also St. John's Gen. Hosp.*, 825 F.2d at 746 ("Mere lapse of time . . . is not grounds to deny an Order of the Board.") The Union is unable to point to any prejudice it would suffer if the Order is enforced now, as opposed to any other time since its issuance. *See NLRB v. Taylor Mach. Prods.*, 136 F.3d 507, 514 (6th Cir. 1998) (absent "a change in the relative positions of the parties the doctrine of laches will not apply") (citation omitted). The Union's argument (Br 23) that enforcement would be prejudicial because the Board wants to have enforcement of the broad order with respect to the 8(b)(1)(A) violations is not an argument about timing, it is merely the Union's wish not to be held accountable under the remedy imposed for those violations.

The Board reasonably waited to seek enforcement of its Order without causing prejudice to the Union because, if the Board had obtained enforcement of its Order sooner, the Board would have obtained contempt power for future

violations, just as it is seeking here, and the Union "would be no worse off than it is." *NLRB v. P*I*E Nationwide*, 894 F.2d 887, 894 (7th Cir. 1990).[7] Furthermore, if the Union wanted to contest the 8(b)(1)(A) violations or the broad order in the interim, it was free to file a petition for review at any time. 29 U.S.C. § 160(f); *Schaefer v. NLRB*, 697 F.2d 558, 560-61 (3d Cir. 1983).

The Union asserts (Br 24) that enforcement would be "repugnant" because it has complied with the Board's Order. It is clearly established, in the words of the Supreme Court, that "[an] employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950); *accord NLRB v. Nat'l Car Rental Sys., Inc.*, 672 F.2d 1182, 1191 (3d Cir. 1982); *NLRB v. Int'l Union of Operating Eng'rs*, 532 F.2d 902, 905 (3d Cir. 1976). Rather, a Board order "imposes a continuing obligation," and "the

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[7] The Union's case citations (Br 21-22) hold no differently. *See NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769, 773 (9th Cir. 1985) (laches inapplicable where Board "did not gain any advantage it did not originally have"); *NLRB v. Michigan Rubber Prods., Inc.*, 738 F.2d 111, 112-13 (6th Cir. 1984) (3-year delay not prejudicial where no change in relative position of the parties) (citing *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962)); *Buchanan v. NLRB*, 597 F.2d 388, 393 (4th Cir. 1979) (laches inapplicable where Board gained no advantage in "litigating main issue" in the case); *see also Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1095 (7th Cir. 1984) (enforcement may be barred by laches following remand where Board failed to count election ballots for 2 years post-election such that probability of union still having majority support small and bargaining order would be irrelevant to current conditions).

Board is entitled to have the resumption of the unfair [labor] practice barred by an enforcement decree." *Mexia Textile Mills*, 339 U.S. at 567.

The Union's additional equitable argument (Br 23) – that this enforcement action is an effort to deprive it of administrative process – reflects a fundamental misunderstanding of the Act's remedial scheme. As such, the argument provides no basis for denying enforcement of the Board's Order. The Union charges (Br 23) the Board with improperly seeking enforcement in an attempt to "circumvent its own administrative processes and bring future transgressions directly to the Court" in the event that future unfair labor practice charges are filed against it. This baseless accusation ignores the Act's enforcement scheme.

As the case law explains, a Board remedial order "is not self-executing," and the Board can compel compliance with its order only by asking a court for an enforcement decree that carries the possibility of future contempt sanctions. *P*I*E Nationwide*, 894 F.2d at 894. Given this statutorily prescribed enforcement method, it is hardly an attempt to "circumvent its own administrative processes" (Br 23) for the Board to seek enforcement simply because that might lead to contempt proceedings if the Union later violates the Act. *See Mexia Textile Mills*, 339 U.S. at 567-68. As the Supreme Court noted over a half-century ago, courts will not "'ordinarily lend a friendly ear'" to a complaint that an enforcement decree

carries the possibility of "punishment for contempt." *Id*. (citation omitted). *Accord NLRB v. Raytheon Co.*, 398 U.S. 25, 28 (1970) (Court recognized there was a "possible sanction of contempt proceedings for violations").

Likewise, the Union's speculative arguments (Br 23) about its vulnerability to contempt proceedings do not warrant denying enforcement of the Board's Order. Whether the Union has engaged in post-enforcement misconduct that might warrant a contempt proceeding is a matter that is best left to the compliance stage of this case. *See generally Sure-Tan*, 467 U.S. at 902 (explaining Board's compliance proceedings); *Nat'l Car Rental*, 672 F.2d at 1191. Additionally, the Board is restrained from rushing into a contempt action for any future charge filed against the Union because it faces a heightened standard of review in a contempt proceeding. *See NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 659 F.2d 379, 383-84 (3d Cir. 1981) (in civil contempt proceeding, Board must establish by "clear and convincing proof" that union violated underlying decree as opposed to the easier burden of "preponderance of the evidence" in an administrative proceeding). Of course, the Union can plainly avoid any contempt proceedings simply by refraining from future misconduct that might violate the Order. And, if it does not, the Union will have its day in court should the Board seek a contempt-of-court adjudication. *See id*. at 381.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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